PERWIRA AFFIN BANK BHD

v.

MOHAN ARUNASALAM ARULGNANAM & ANOTHER CASE

HIGH COURT MALAYA, KUALA LUMPUR
ARIFIN JAKA J
[BANKRUPTCY NOS: D3-29-9328-90 & D5-29-9330-90]
2 DECEMBER 1999

BANKRUPTCY: *Interest - Accrued interest from date of bankruptcy notice till date of payment - Whether judgment creditor entitled to said interest under s. 40(3) of Bankruptcy Act 1967 - Whether s. 40(3) applied only if judgment debtors declared bankrupt*

BANKRUPTCY: *Creditor's petition - Dismissed by Senior Assistant Registrar on ground that judgment debtors able to pay amount stated in notice - Whether dismissal of petition justified - Bankruptcy Act 1967, s. 6(3)*

This was an appeal by the judgment creditor, *ie*, Perwira Affin Bank Berhad against the decision of the Senior Assistant Registrar ('SAR') who had dismissed its creditor's petition issued separately against the judgment debtors. The SAR had dismissed the said petitions on the basis that the judgment debtors were able to satisfy the amount demanded therein. The judgment creditor argued that the judgment debtors should pay accrued interest from the amount demanded in the bankruptcy notice ('BN') that was served on them until date of full payment thereof so as to avoid the adjudication and receiving orders be made against them. It also contended it had the right to claim for such continuing interest under s. 40(3) of the Bankruptcy Act 1967 ('the Act') and referred to the case of *Re A Debtor*.

Held:

[1] Section 40(3) of the Act deals with debts provable in bankruptcy. These debts are to be proved before the Official Assignee after the receiving and adjudication orders are pronounced. The said debts include accrued interests calculated from the date of the issue of the BN up to date of full realisation. It is not the debt referred to under s. 6(3) of the Act.

[1a] In *Re Debtor* the postponed interest therein was a debt payable by the debtor under a special provision in the Money Lenders Act 1927 (UK) which preserves the right of a money lender to claim for the postponed interest as stated in the petition. There is no such provision in our system and that case was not applicable to the facts in this instance. Thus, the judgment creditor was entitled to payment of the amount stated

in the petition which was based on the BN. The continuing interest on the judgment debt which accrued after the date of the BN constituted a debt provable in bankruptcy under s. 40(3) of the Act only if the judgment debtors were declared bankrupt.

[2] Under s. 6(3) of the Act the court may dismiss the petition if it is satisfied that the debtor is able to pay his debts. The debtors were prepared to pay the amount as stated in the BN and in the petition. This was an obvert act on the part of the debtors to show that they were able to pay the debts claimed.

[2a] The amount demanded in the BN must be quantified as the debtor is entitled to know from the BN exactly what is being claimed to be due on the whole judgment debt and payable by him within the seven day period. At the time of issue of the BN, the judgment creditor must be in a position to issue execution. The amount demanded in the BN this instance was quantified and the judgment debtors were right in not disputing this. Further, the judgment debtors did not dispute that an act of bankruptcy had been committed by them for non-compliance of the BN in failing to pay the amount demanded within the 7-day period. They only claimed that they were able to pay the amount claimed as stated in the BN which was rejected by the judgment creditor. In the circumstances, the judgment debtors had satisfied the court that they were able to pay their debts which would justify the dismissal of the petition.

[Appeal dismissed and order of SAR confirmed.]

Case(s) referred to:

Fauzia Osman v. Bank Bumiputra Malaysia Bhd and Another Appeal [1991] 1 MLJ 436 ***(refd)***

Low Mun v. Chung Khiaw Bank Ltd [1988] 1 MLJ 263 ***(refd)***

Re A Debtor (No 231) [1936] 3 All ER 641 ***(dist)***

Legislation referred to:

Bankruptcy Act 1967, ss. 3(1), 6(3), 40(3)

Bankruptcy Rules 1969, rr. 178, 179, 180, 181, 182, 183, 184, 185, 186, 187

Money Lenders Act 1927 [UK], s. 9(1)

For the appellant - M/s Nik Hussain & Partners

For the respondent - M/s Clough Thuraisingham & Jeya Mahesan

Reported by Usha Thiagarajah

JUDGMENT

Arifin Jaka J:

This is an appeal from the decision of the learned Senior Assistant Registrar (SAR) dated 4 September 1997 dismissing the creditors' petition with costs.

The facts so far as they are material for the purpose of this appeal are these. Perwira Affin Bank Berhad (formerly known as Perwira Habib Bank Malaysia Berhad) ("the judgment creditor") obtained a final judgment on 8 April 1988 against Muhaimi Ahmad Mustapha and Mohan Arunasalam ("the judgment debtors") *vide* High Court Kuala Lumpur (Commercial Division) Suit No. C-24-3748-86 for payment of the sum of $34,078.53 with interest at the rate of 16.5% per annum on monthly rests till date of full settlement and $350 costs. Based on this judgment the judgment creditor issued a bankruptcy notice dated 20 December 1990 separately against the judgment debtors. The notice was served on both judgment debtors. The demand for payment in the bankruptcy notice against each of the judgment debtor is for payment within seven days after service of the notice excluding the day of such service was for "the sum of $39,578.94" as being the amount due as at 20 December 1990 as shown in the "particulars" therein. The act of bankruptcy relied upon by the judgment creditor was the judgment debtors' failure to comply within seven days of service of the notice as provided under s. 3(1) of the Bankruptcy Act 1967 ("the Act"). On 27 April 1992 the judgment creditor issued a creditors' petition against the judgment debtors separately (*vide* Bankruptcy No. D3-29-9328-90 – Mohan Arunasalam Arulgnanam s/o Arunasalam and *vide* Bankruptcy No. D3-29-9330-90 – Muhaimi Mustapha). In the petition the amount claimed by the judgment creditor is the sum of $39,578.94 being the aggregate sum which was still justly and truly due and payable to the judgment creditor as at 20 December 1990, the date of filing the bankruptcy notice. The petitions were served on both the judgment debtors.

By an order of court dated 21 July 1994 the petitions were consolidated and heard together. On 4 September 1997 the SAR heard and dismissed the petitions on the ground that he is satisfied that the judgment debtors are able to pay the debts. At the hearing before me counsels for both parties agreed that the only issue to be decided is whether the judgment creditor in this case is required under the law to accept the sum as stated in the bankruptcy notice or is entitled to full payment of the judgment sum including accrued interest calculated from the date of bankruptcy notice until date of full payment under the terms of the judgment dated 8 April 1988 on which the bankruptcy notice is based.

It is the judgment creditors' case that they are entitled to claim further interest on the judgment sum from the date of bankruptcy notice until the date of receiving and adjudicating orders are made against the judgment debtors. They argued therefore that the judgment debtors have to pay the amount inclusive of accrued interest calculated from 20 December 1990 *ie*, date of bankruptcy notice to date of full realisation to avoid the adjudication and receiving orders be made against them at the hearing of the petitions.

In the support of this contention the learned counsel relied on s. 40(3) of the Act which reads as follows:

> Save as provided under subsections (1) and (2) all debts and liabilities present or future, certain or contingent, to which the debtor is subject at the date of the receiving order or to which he may become subject before his discharge by reason of any obligation incurred before the date of the receiving order shall be deemed to be debts provable in bankruptcy.

It is further contended by the learned counsel that this section preserves the right of a judgment creditor to claim for the continuing interest. With the greatest respect I disagree with the contention of the learned counsel. Section 40(3) of the Act deals with debts provable in bankruptcy and such debts and the proof of such debts are governed by rules 178 – 187 of the Bankruptcy Rules 1969. These are debts to be proved before the official assignee after the receiving and adjudication orders are pronounced. The section must be read on its own and it concerns the debts which would include the accrued interests calculated from the date of the issue of the bankruptcy notice up to date of full realisation. It is not the debt that is referred to under s. 6(3) of the Act which I shall refer to in detail later in this judgment.

The learned counsel also referred to *Re A Debtor* (No 231 of 1936) 3 All England Law Reports Annotated 641. This case dealt with the sum of postponed interest which was claimed by the petitioning creditor in addition to a claim for the balance of principal of certain loans with interest at five per cent. The postponed interest claimed is provided for under s. 9(1) of the English Money Lenders Act 1927. The debtors tendered the balance of the principal interest at five per cent and costs but not the postponed interest and contended that this was sufficient for dismissal of the petition. The registrar rejected this contention and made a receiving order against the debtor. On appeal it was held by the Court of Appeal that there was not sufficient cause for the dismissal of the petition because the postponed interest was in law owing by the debtor and recoverable in bankruptcy proceedings after all other debts were paid in full. The facts in this case are different from the facts in our instant case in that the postponed interest in that case is a debt payable by the debtor under a special provision in the Money Lenders Act 1927 which

preserves the right of a money lender to claim for the postponed interest as stated in the petition. There is no such provision in our system and that case is not applicable to the facts in our instant case. For this reasons I am of the view that the judgment creditors are entitled to payment of the amount which has been stated in the petition which is based on the bankruptcy notice which stated the sum payable by the judgment debtor. The continuing interest on the judgment debt which accrued after the date of the bankruptcy notice constitutes a debt provable in bankruptcy under s. 40(3) of the Act after the judgment debtors are declared bankrupt.

The next issue to be considered is whether the judgment debtors have satisfied the court that they are able to pay their debts that would justify the court to dismiss the petition. This calls for an examination of s. 6(3) of the Act which states:

> If the court is not satisfied with the proof of the petitioning creditors debt or of the act of bankruptcy or of the service of the petition, **or is satisfied by the debtor that he is able to pay his debts** or that for other sufficient cause no order ought to be made, the court may dismiss the petition (underlining is mine).

Under this section it is clearly provided *inter alia* that the court may dismiss the petition if it is satisfied that the debtor is able to pay his debts. The court is vested with the discretion to dismiss the petition and the discretion is to be exercised if there is evidence that the debtors are able to pay the debt . In the instant case the debtors are prepared to pay the amount as stated in the bankruptcy notice and in the petition. To my mind this is an obvert act on the part of debtors to show that they are able to pay the debts claimed but the judgment creditors are not willing to accept the amount.

To my mind the judgment debtors are only liable to pay the sum of $39,578.94 being the amount due as at 20 December 1990, as stated in the bankruptcy notice and petition. It is trite law that the amount demanded in the bankruptcy notice must be quantified because the debtor is entitled to know from the bankruptcy notice exactly what is being claimed to be due on the whole judgment debt and payable by him within the seven day period and that at the time of issue of the bankruptcy notice, the judgment creditor must be in a position to issue execution (see *Low Mun v. Chung Khiaw Bank Ltd* [1988] 1 MLJ 263 which was followed in *Fauzia Osman v. Bank Bumiputra Malaysia Bhd and Another Appeal* [1991] 1 MLJ 436).

In the instant case the amount stated in the bankruptcy notice are quantified and the judgment debtors are right in not disputing this on the authority of *Lee Mun* and *Fauzia.* The judgment debtors are not disputing that an act of

bankruptcy had been committed by them for non compliance of the bankruptcy notice in failing to pay the amount demanded within the seven day period. What they say is that they are able to pay the amount claimed as stated in the notice which was rejected by the judgment creditor.

The question is whether the judgment debtors have satisfied the court that they are able to pay their debts which would justify the dismissal of the petition. Under the circumstances of the case I am satisfied that the judgment debtors has satisfied the court that they are able to pay their debts.

Accordingly for the reasons stated above I dismissed the appeal and confirm the order of the learned SAR.